Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1645

MICHAEL F. COIRO, JR.,

Petitioner,

against

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: June 27th, 1975

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The Petitioner, Michael F. Coiro, Jr. prays that a Writ of Certiorari issue to review the judgment entered on May 29th, 1975, by the United States Court of Appeals for the Second Circuit, in the proceeding entitled In Re Michael F. Coiro, Jr., Attorney for Thomas De Simone, Docket No. 74-1039.

Opinion Below

The Court of Appeals for the Second Circuit rendered its judgment in this case without opinion. The judgment of the Court of Appeals appears in the Appendix at **Page A-1.**

Jurisdiction

The judgment of the Court of Appeals was entered on May 29th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether Petitioner-Attorney's conduct in the case at bar was sufficient to warrant a conviction for criminal contempt?

Statutory Provisions Involved

Title 18, United States Code, Section 401, provides that

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) misbehavior of any of its officers in their official transactions;
>
> (3) disobedience or resistance to its lawful writ, process, order, rule, degree, or command."

Rule 42(b) of the Federal Rules of Criminal Procedure provides as follows:

> "(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The

> defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 7 of the Individual Assignment and Calendar Rules of United States District Court for the Eastern District of New York provides:

> "Conference 'After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial."

Statement of The Case

The Petitioner is an attorney who was fined in the amount of $1,000 for his failure to appear in the Federal District Court on a scheduled date for trial. In response to the charges against him, Petitioner explained that one week prior to the date in question he was ordered by a New York State Supreme Court Justice to begin another trial which made it impossible for him to appear in Federal Court. Petitioner further explained that the State Court Justice was advised of the pending Federal engagement but refused to respect that commitment and further, that Petitioner attempted to give reasonable notice to the District Court Judge of his State Court commitment.

The relevant facts are not in dispute. On May 2nd, 1974, petitioner undertook the representation of Thomas De Simone, a defendant named in Indictment, 74 CR 336, filed in the United States District Court for the Eastern District of New York on the previous day, May 1st.

The De Simone case was first tried in October of 1974. On October 3rd, 1974, a mis-trial was declared after the jurors' reported that they were unable to reach a unanimous verdict. Following dismissal of the jury, re-trial was set for November 18th, 1974. Thereafter, the case was re-scheduled to begin on November 25th, 1974. This adjournment was at the request of Government counsel.

Five days prior to the scheduled date of trial, on November 20th, 1974, Petitioner contacted District Court Judge Bartels' chambers and requested an adjournment of the De Simone trial on the ground that he was unavoidably engaged in the trial of another criminal case in the New York State Supreme Court, Queens, County. This request for an adjournment was denied. The District Court, disregarding counsel's actual engagement, summoned a jury panel and stood ready to try the case. As Petitioner was actually engaged in trial, he did not appear.

Although the District Court had been informed that the State Court case would last for several weeks, the De Simone trial was re-scheduled for one week later, December 2nd, 1974. In response to notification of the December 2nd date, Petitioner submitted a sworn affidavit which recited the fact that he was still engaged in the trial of the same case in Queens County. On the basis of this affidavit the trial was again re-scheduled for January 6th, 1975, when it was ultimately tried.

On December 9th, 1974, Judge Bartels signed an order directing Petitioner to show cause why he should not be

punished for contempt of court, pursuant to Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The Order to Show Cause set forth the above stated facts.

On January 16th, 1975, a hearing was held on the contempt charge. At that hearing Petitioner explained his inability to begin the De Simone trial on the scheduled date of November 25th. One week earlier, on November 18th, 1974, Petitioner made an appearance in the criminal case of People of the State of New York against Joseph Zevrizzo. (A 12)[1] This was a multiple defendant case involving five defendants represented by four lawyers. Petitioner stated that he did not immediately inform Judge Bartels' of the Queens engagement because there were plea negotiations and "counsel thought that the case would ultimately be disposed of by way of a plea." (A 12) As soon as counsel realized that the case would have to be tried he informed Judge Bartels' Chambers. (A 12-13) Exercising even further caution, Petitioner asked that the State Supreme Court Justice's Law Secretary contact Judge Bartels to officially notify him of the engagement. (A 13) This effort was unsuccessful due to the intervening Thanksgiving Holidays. (A 13)[2]

Petitioner further explained that he made the State Supreme Court Justice aware of his imminent Federal engagement but nevertheless was ordered to proceed to trial (A 15, 18, 21) In Petitioner's words, "He ordered me to proceed anyway . He had the other three lawyers there." (A 21) Rejecting this excuse, the Federal District Court

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[1] The letter "A" refers to Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

[2] This call was made after the scheduled date of November 25th but before the adjourned date of December 2, 1974.

Judge reasoned that he could protect counsel from a contempt proceeding from the State Court Judge but conversely the State Court Judge could not protect counsel from a Federal contempt proceeding. (A 23) Recognizing that counsel was on the horns of a dilemma, Judge Bartels concluded by stating "You just bet on the wrong horse." (A 23) On the basis of this conduct, Petitioner was "charged" $1000.00. (A 23)

Reasons for Granting the Writ

Petitioner respectfully calls upon this Court, in the exercise of this Court's supervisory power, to review the action taken by the District Court which was summarily ratified by the Circuit Court of Appeals. What is at stake here is not simply a $1,000 fine or even the isolated discipline of a single attorney. More importantly, this case affords the court an opportunity to set forth guidelines, heretofore uncertain, concerning priorities and obligations of attorneys to insure the prompt disposition of criminal cases. This is particularly necessary in an era where the backlog of criminal cases has become one of the most acute problems facing the administration of criminal justice.

Petitioner herein freely admitted to the District Court, as he does on this Petition, that he was impaled on the horns of a dilemma with an uncertain plan of resolution. Had there been precise and definitive guidelines specifically addressed to this situation, what happened in this case could not have occurred. Or stated differently if it had then occurred Petitioner would have no cause to complain about the action taken against him.

With reference to the particular facts of this case, Petitioner's contention is that his conduct did not rise to the

level of a criminal contempt. First, it should be noted that the District Court characterized the sanction imposed on Petitioner as something less than criminal contempt, in the nature of assessment of costs. However, the charges against Petitioner were specifically pleaded in a criminal milieu. Indeed, the prayer for relief cites specific reference to the criminal contempt provisions of Title 18, United States Code, Section 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure. The hearing on the Court's Order to Show cause discloses that an essential ingredient of the punishment was to deter others from engaging in similar conduct. The District Court stated that

> "It is my duty to set the rule straight so that others cannot follow". (A 16)

Earlier the Court had stated that

> "Now I am giving you this Order to Show Cause not because I want in any way to impose sanctions on you for my sake, but I want to protect this court.
>
> "I am representing the Court on the Court [sic] as a whole." (A 15)

Petitioner argued in the Circuit Court of Appeals, and Government counsel agreed, that for purposes of review the action taken was a criminal contempt. *Nye* v. *United States,* 313 U. S. 33 (1941); *McCrone* v. *United States,* 307 U. S. 61 (1939).

To warrant a conviction for criminal contempt it must be shown beyond a reasonable doubt that the contemnor had the intention to obstruct, disrupt or interfere with the administration of justice. In Re Williams, 509 F.2d 949 (2nd Cir., 1975); *United States* v. *Peterson,* 456 F.2nd 1135, 1140 (10th Cir., 1972). In *Sykes* v. *United States,* 444

F.2nd 928 (D.C.Cir., 1971) the Court noted that contempt is a

> ". . . *wilful* disregard or disobedience of a public authority."

The Court in *In Re Farquhar*, 492 F.2d 561 (D.C. Cir., 1973) stated that

> "Criminal contempt requires both a contemptuous act and a wrongful state of mind."

The Point urged by Petitioner in this case is that even if he was required to approach this problem in a different manner or indeed in the manner suggested by the District Court, his failure to do so does not constitute criminal contempt.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
MICHAEL F. COIRO, JR.

LA ROSSA, SHARGEL & FISCHETTI
Of Counsel

June 27, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-1039

—o—

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of May one thousand nine hundred and seventy-five.

Present:
WILLIAM HUGHES MULLIGAN
WILLIAM H. TIMBERS
MURRAY I. GURFEIN
Circuit Judges,

—o—

In re MICHAEL F. COIRO, JR., *Attorney for Thomas DeSimone,*
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

—o—

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order imposing costs on appellant of said District Court be and it hereby is affirmed on the proceedings below.

WILLIAM HUGHES MULLIGAN
William Hughes Mulligan

WILLIAM H. TIMBERS
William H. Timbers

MURRAY I. GURFEIN
Murray I. Gurfein

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

MICHAEL F. COIRO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1645

MICHAEL F. COIRO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, contends that his conduct in failing to appear to represent his client in a criminal case on two successive trial dates is insufficient to sustain his conviction for criminal contempt.

Petitioner was convicted of criminal contempt in the United States District Court for the Eastern District of New York for failure to appear for trial pursuant to two court orders, in violation of 18 U.S.C. 401. He was assessed costs of $1,000. The court of appeals affirmed (Pet. App.).

1. On May 2, 1974, petitioner undertook to represent Thomas De Simone in the United States District Court for the Eastern District of New York, for violations of 18 U.S.C. 549, 659 and 1951 (theft from interstate shipment). A first trial, from October 1 to October 3, 1974, ended in a mistrial because the jurors were un-

able to reach a verdict (A. 1-2).[1] On October 3, 1974, petitioner agreed to a new trial date of November 18, 1974 (A. 2, 9), which, two or three days later, with the consent of petitioner, was reset for November 25, 1974 (G. App. 5).

Five days before the agreed trial date, on November 20, 1974, petitioner contacted the presiding judge's chambers and requested a postponement of several weeks because he was representing a defendant in a trial in the New York State Supreme Court. This request was denied (A. 10). On November 25, 1974, the federal case was called for trial. Petitioner's client, Mr. De Simone, appeared; the prosecution appeared, ready to proceed; and a jury panel was made available. Petitioner failed to appear. Instead, his client presented an "affirmation" by petitioner advising that he was engaged in a trial in the New York State Supreme Court, and requesting adjournment to a later date (G. App. 10). Since Mr. De Simone was unrepresented, the trial was adjourned until December 2, 1974. The trial judge indicated that petitioner had disobeyed the court's order to appear (G. App. 7), and that this failure to appear would be taken up with the district court's Board of Judges (G. App. 8). The court notified petitioner of the new trial date by certified mail (A. 11), and the government did also (G. App. 14).

[1]"A." refers to petitioner's appendix on appeal. "G. App." refers to the government's appendix on appeal, a copy of which has been lodged with this Court.

[2]The government also informed petitioner that sanctions would be imposed for his failure to appear on November 25 (G. App. 14).

On December 2, 1974, petitioner again failed to appear for trial. A second affirmation, dated November 29, but received by the court on the trial date, again recited that due to petitioner's state court engagement, he would be unable to appear for trial on December 2, 1974 (G. App. 11). Mr. De Simone's trial again had to be adjourned.

A week later the district court issued an order directing petitioner to show cause, on January 16, 1975, why he should not be held in contempt of court pursuant to 18 U.S.C. 401(3) and Rule 42(b), Fed. R. Crim. P. (A. 4-6).[3] At the January 16 hearing (A. 7-25) petitioner conceded that he had failed to appear for trial despite the court orders that he do so (A. 11). Petitioner explained that his contemporaneous state court engagement had prevented him from appearing for Mr. De Simone on the successive federal trial dates. The state court trial had begun on November 18, 1974, and the state court judge "ordered [him] to proceed" with the trial (A. 21).[4] Petitioner said that he did not inform the federal court until November 20, 1974, of his unavailability for trial because there were three plea negotiations in the state matter between November 18 and November 20: the state court judge and "the other counsel [all] thought that the case would ultimately be disposed of by way of a plea" (A. 12).

[3]The show cause order recited that petitioner's failure to appear, as ordered, on November 25, 1974, and December 2, 1974, seriously interfered with the district court's proceedings "in that it was unable, due to [petitioner's] sudden and inexcusable failure to appear, to schedule another case for trial for the week of November 25, 1974, and also for the beginning of the week of December 2, 1974" (A. 5).

[4]At the show cause hearing petitioner informed the court that he apprised the state court judge of the federal engagement (A. 21). It is not evident when this notification to the state judge was made. Petitioner further indicated that the state judge made an unsuccessful effort to contact the federal court on the day after Thanksgiving (November 28, 1974).

The district court held petitioner in contempt. It emphasized that due to petitioner's conduct, it had twice been unable to proceed with Mr. De Simone's scheduled trial. The waste of time and resources showed "that the administration of justice is seriously interfered with" (A. 14). The court cautioned that when such problems arise "it is customary for counsel to indicate right away" that he will be unable to appear on the scheduled date, and not wait until the last minute to notify the court of the conflict (A. 14). The court thereupon imposed against petitioner one thousand dollars in costs, as an alternative to a fine for contempt (A. 20).

2. Petitioner contends that his conduct in disobeying two court orders to appear for trial does not constitute willful and reckless disregard of the authority of the court.

Pursuant to 18 U.S.C. 401(3), the district court has the power to punish such contempt of its authority as "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Petitioner violated two successive trial date orders and Local Rule 7, governing trial assignments. His conduct was more than sufficient to warrant imposition of sanctions for criminal contempt.

An attorney may be held guilty of criminal contempt for failure to appear at trial when his conduct subverts the orderly processes of the court[5] and thus obstructs the administration of justice, and reflects criminal intent. *In re Gates*, 478 F.2d 998 (C.A. D.C.). These elements must be established beyond a reasonable doubt. *United States* v. *Peterson*, 456 F.2d 1135, 1140 (C.A. 10). The requisite intent may be inferred when the attorney's conduct discloses a reckless and/or willful disregard for the court's orders or his professional duty. *Sykes* v. *United States*, 444 F.2d 928, 930 (C.A. D.C.); *In re Gates, supra*; cf. *In re Williams*, 509 F.2d 949, 960 (C.A. 2) (contempt for behavior obstructing administration of justice by a non-attorney).

[5]Notwithstanding the district court's characterization of the proceedings on the show cause order as a civil hearing (A. 9), the sanction imposed was in the nature of criminal contempt. The show cause order charged criminal conduct punishable under 18 U.S.C. 401(3) and Rule 42(b), Fed. R. Crim. P. (A. 6), and of controlling significance, the sanction was imposed to vindicate the authority of the court (A. 15). See *United States* v. *United Mine Workers of America*, 330 U.S. 258; *Nye* v. *United States*, 313 U.S. 33; *In re Osborne*, 344 F.2d 611 (C.A. 9). The fact that costs rather than a fine was imposed does not detract from the criminal character of the sanction. *Nye* v. *United States, supra*, 313 U.S. at 42.

The requirements of the orderly administration of justice, and of an attorney's duties to court and client, called for application of contempt sanctions to petitioner's conduct. His assertion that he was "impaled on the horns of a dilemma with an uncertain plan of resolution" (Pet. 6) is insufficient. Petitioner knew far in advance of the federal trial date that a possible conflict would arise.[6] His behavior in waiting almost to the last minute to notify the federal court of his state engagement discloses a reckless disregard of his professional duty, which alone warrants the inference of a willful and reckless disregard of the court's authority. It had serious consequences on the court's orderly processes, and petitioner does not deny that, as both the district court and the court of appeals concluded, the administration of justice was seriously obstructed.

[6]The district court emphasized that petitioner's failure to appear, as ordered, on November 25, 1974, a date agreed upon by him, and December 2, 1974, resulted in his inability to perform his duties under the Individual Assignment Calendar of the district court (A. 14-15). The net result of petitioner's deliberate failure to appear was made unmistakably clear to him at the hearing (A. 13):

> [T]his Court is placed in a position where [it] cannot proceed and a considerable amount of time is lost because one cannot call up the last minute and bring in a jury or other lawyers to try a case which is not set down for trial.

This is not a case like *Sykes* v. *United States, supra*, 444 F.2d at 930, in which the requisite intent was lacking because the attorney's failure to appear resulted from a lapse of memory, preoccupation with another case, and confusion as to dates. On the contrary, petitioner was acutely aware of the scheduled dates for his appearances in federal court. Moreover, there is a substantial difference between the eight minutes of tardiness in returning to a trial involved in *In re Farquhar*, 492 F.2d 561 (C.A. D.C.), on which petitioner relies (Pet. 8), and his two successive failures to appear for trial.

Even though Mr. De Simone's second trial had been scheduled with petitioner's consent before the state court proceeding was set,[7] petitioner assumed that the federal court could easily adjourn matters for his convenience, if he simply did not show up. Such conduct was both willful and intolerable to the efficient administration of the federal courts. See *In re Niblack*, 476 F.2d 930 (C.A. D.C.), certiorari denied, 414 U.S. 909. The relatively mild disciplinary sanction imposed in this case may result in encouraging attorneys in the Eastern District of New York to attend more closely to their professional obligations concerning the scheduling of trials.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[7]Petitioner conceded on oral argument in the court of appeals that he knew as early as November 4, 1974, that trial on the state cause would commence on November 18, 1974. Further, at the show cause hearing petitioner unequivocally agreed with the trial judge's observation that "As a matter of fact, as I understand the statement you made to me the other day, this second case in Queens County [New York], arose after you had already been ordered by this Court, to be ready on November 25" (A. 10).